IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 3134 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MANISH MOHANLAL SHAH (CHOPRA)
Versus
MANHER SUKHLAL PATEL

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Appearance :
MR HEMANT S SHAH for the Petitioner
MR MANISH R RAVAL for the Respondent

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 04/04/2007

ORAL JUDGMENT

1. **RULE**. Learned Advocate Mr.Manish R.Raval waives service of Rule on behalf of the respondent.

2. Present is the case wherein the petitioner –

original applicant – defendant in Summary Civil suit No.2357 of 2004 is before this Court being aggrieved by order passed in Civil Misc.Application No.509 of 2004 (for restoration) by the learned Judge, City Civil Court No.15, Ahmedabad dated 05.01.2007, whereby the learned Judge was pleased to dismiss the application with costs.

3. Learned Advocate, Mr.Shah, for the petitioner invited attention of the Court to the contents of Civil Misc.Application No.509 of 2004, wherein it is set out that on 06.10.2004, summons were served through bailiff, but all of a sudden, the petitioner was required to leave for Rajasthan on the dame day as he received a message that his brother-in-law has suffered an attack of paralysis. The petitioner returned to Ahmedabad on 26.10.2004, on that very day, he met with an accident and for treatment, he was required to be in-door patient from 27.10.2004 to 30.10.2004 and later on, for further treatment, he was again required to be in-door patient from 06.11.2004 to 10.11.2004. On 17.12.2004, the Court passed an ex parte decree in Summary Civil Suit No.2357 of 2004. It is against that decree that the application was filed praying that the ex parte decree be set aside and the suit be tried after giving necessary opportunity. It is this application which is rejected and that order is under challenge.

4. The learned Judge has observed in paragraph No.7 of his judgment and order as under:

> ".... This Court is of the considered opinion that the applicant/defendant of the original suit **was not prevented to engage lawyer to arrange to enter appearance in the court as he was already intimated of the due date and in case of any urgency, any Power of Attorney could have been appointed to avoid the same which is not done**....."

The expectation of the learned Judge is unreasonable by any standard of reasonableness. When it is stated in the application that the applicant met with an accident, for which he was required to be treated as an in-door patient, to expect the applicant – petitioner herein to find out time to engage an Advocate or in alternative, to make arrangement for appearing in the shit by appointing Power of Attorney, is too high an expectation on the part of the learned Judge.

5. Mr.Manish R.Raval, learned Advocate for the respondent pointed out that in the execution proceedings, stay was granted on condition of applicant depositing Rs.30,000/-. The said amount was deposited by the applicant and that is withdrawn by the original plaintiff. Even then, nothing so irreversible has taken place which cannot be taken care of.

6. In view of the aforesaid discussion, order dated 05.01.2007 and decree passed on 17.12.2004 are hereby quashed and set aside. The Court below is directed to proceed with the trial of the suit in accordance with law. The applicant – petitioner herein shall file his appearance before the learned Judge on or before 18.04.2007.

The amount deposited and paid to the original plaintiff shall be subject to the orders passed on application for Summons for Judgment. It goes without saying that the same will be subject to the final outcome of the suit.

7. The petition is allowed. Rule is made absolute with no order as to costs.

(RAVI R.TRIPATHI, J.)

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